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No. 94-830

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

USX CORPORATION,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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REPLY BRIEF OF PETITIONER

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1. The weakness of the position of the United States in this case is nowhere better illustrated than in its recitation of the events giving rise to this prosecution. There, the United States, like the court of appeals, emphasizes certain testimony that, if credited by the jury, would have supported an inference that the leaves of absence at issue were provided by USX to Rich and Phillips as a *quid pro quo* for their cooperation in approving and implementing the Fairfield Agreement. See United States Br. 3-7; App. 2a-16a. That inference was, of course, hotly contested by the defendants at trial.

More importantly, however, the district court permitted the government to delete any reference to a *quid pro quo* from the LMRA counts in the indictment and to tell the jury to convict the defendants on those counts regardless of USX's purpose in granting, and Rich's and Phillips's

purpose in accepting, the leaves of absence at issue.[1] This theory, when coupled with the district court's instruction that defendants could be convicted of violating the LMRA regardless of their belief as to the legality of their actions, allowed the prosecution to argue in closing that convictions on Counts Two through Five were appropriate so long as "the defendants were awake . . . [and] it wasn't computer error." R41-9576.

Having expressly chosen to prosecute these defendants under a theory bordering on strict criminal liability, the United States should not be permitted to defeat this petition with a one-sided rendition of "facts" irrelevant under that theory.

2. The United States concedes that there is a conflict between the two courts of appeals that have considered the meaning of the term "willfully" in section 302(d)(2) since that provision was amended in 1984. See United States Br. 25-26. The court of appeals also acknowledged this conflict. See App. 27a, 34a.[2] In opposing certiorari on this issue, the United States simply restates the argu-

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[1] As was pointed out in USX's Petition, the LMRA counts in the original indictment as returned by the grand jury specifically charged that the leaves of absence were granted to Rich and Phillips "for having approved the December 24, 1983, Fairfield Works Agreement and for being cooperative in its implementation and interpretation . . . ." R1-1-13-16; Pet. 5. At trial, the United States successfully moved to delete this specification of a *quid pro quo* from Counts Two through Five as surplusage. R35-6551-54.

[2] In defining the supposed "majority" and "minority" camps on this issue, the court below counted itself as joining several other circuits whose decisions predated the 1984 amendment. App. 27a, 34a. Notably, neither the opinion below nor the Brief for the United States adopts or even defends the reasoning of those pre-amendment cases, which were bottomed on a patently erroneous reading of certain dicta in *United States* v. *Ryan*, 350 U.S. 299, 305 (1956). *See, e.g., United States* v. *Lanni*, 466 F.2d 1102, 1110 (3d Cir. 1972); *United States* v. *Ricciardi*, 357 F.2d 91, 100 (2d Cir.), *cert. denied*, 384 U.S. 942 (1966).

ments offered by the court below in support of its chosen interpretation.

Those arguments—that the structure and legislative history of section 302(d) lead to the conclusion that the term "willfully" requires nothing more than general intent —were adequately rebutted in USX's Petition, as well as in the Petition filed by Rich and Phillips at No. 94-831. At this juncture, however, it bears noting that the Seventh Circuit, in *United States* v. *Papia*, 910 F.2d 1357 (7th Cir. 1990), also studied the structure and legislative history of that provision and reached exactly the opposite conclusion. See *id.* at 1362-63.[3]

3. In arguing that this Court should not clarify the legality of leaves of absence under section 302 of the LMRA, the United States concedes that the Third Circuit and the Seventh Circuit have disagreed as to what, if any, attributes of such leaves of absence might qualify them for the exception set forth in section 302(c)(1). See United States Br. 13-17. *Compare Trailways Lines, Inc.* v. *Trailways, Inc. Joint Council of the Amalgamated Transit Union*, 785 F.2d 101 (3d Cir.) (holding that any benefits earned after a former employee leaves to work for the union are illegal), *cert. denied*, 479 U.S. 932 (1986), *with Toth* v. *USX Corp.*, 883 F.2d 1297 (7th Cir.) (specifying that leaves of absence would be legal if provided pursuant to a collective bargaining agreement), *cert. denied*, 493 U.S. 994 (1989). The United States neglects to mention, however, that the court of

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[3] Puzzlingly, the United States contends that *Papia* "did not consider whether an interpretation of 'willfully' to require specific intent would render other parts of the statute superfluous, nor did it consider the legislative history of the 1984 amendments . . . ." United States Br. 26. A reading of *Papia* itself refutes that assertion. *See United States* v. *Papia*, 910 F.2d 1357, 1363 (7th Cir. 1990) ("[c]omparing § 186(d)'s structure before and after the amendment scotches any notion that Congress was not adding a new intent element") ("[t]he legislative history fortifies this conclusion").

appeals in *this* case rejected the approaches of both the Third Circuit and the Seventh Circuit and fashioned yet another test of legality under section 302(c)(1), a test focusing on whether the leaves of absence are conferred retroactively. See App. 22a.

Despite this disarray in the lower courts over the meaning of the (c)(1) exception, the United States argues that certiorari is inappropriate because "[n]o court of appeals that has addressed the scope of [the exception] would have found the payments in this case to be lawful, and this case does not implicate any broad-ranging policy issues regarding the scope of [the exception]." United States Br. 16-17. The first argument offered by the United States, while perhaps literally true, is misleading; the second argument is simply wrong.

Even if the leaves of absence at issue here would now be proscribed under *Trailways* because they conferred benefits to union officials, under *Toth* because they were not embodied in a collective bargaining agreement, and under the decision below because they were granted retroactively,[4] none of these various tests had been announced at the time USX was deciding whether to change its leave-of-absence policy. On the contrary, all indications at that time were that section 302(c)(1) meant exactly what it said—that USX could extend a leave of absence for a "former employee" who had become a union official as

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[4] *But see Communications Workers* v. *Bell Atlantic Network Servs., Inc.*, 670 F. Supp. 416 (D.D.C. 1987) (upholding the legality of leaves of absence similar to those found illegal in *Trailways*). According to the United States, the leaves of absence granted by USX would not be legal under the test formulated in *Bell Atlantic* because they were not "terms of employment for which [the union] bargain[ed]." United States Br. 16 n.9. On the contrary, the evidence at trial demonstrated that, prior to revising its policy, USX believed it was responding to a proposal by the United Steelworkers of America regarding eligibility for extended leaves of absence, an issue of great importance to the union. R5-1682-84; R5-1693-1701.

long as that extension was provided "by reason of[] his service as an employee" of USX. Nowhere in that statute was (or is) there any notice that such benefits must be embodied in a collective bargaining agreement or that they cannot be conferred retroactively. Indeed, the government's decision to delete the *quid pro quo* element from the LMRA counts to avoid having to prove specific intent reveals plainly its concern that this confused state of the law would undercut its effort to prosecute petitioners.

When the courts in *Trailways* and *Toth* later read the (c)(1) exception more narrowly, they did so not because of any clear textual command but rather to effectuate—in civil litigation—what they perceived as the policies underlying the LMRA. See 785 F.2d at 107-08; 883 F.2d at 1303-06. Similarly the court below, and the United States in its Brief, look primarily to these perceived policies to justify the rule announced in this case. See App. 20a-22a; United States Br. 15-17. In a criminal prosecution, however, federal courts may not redefine the charged offense to suit some perceived policy, no matter how salutary. The Constitution demands that such decisions be left to Congress and that statutory ambiguities be strictly construed in favor of the defendants. See *Hughey* v. *United States*, 495 U.S. 411, 422 (1990). Neither the United States nor the court below even acknowledged, let alone followed, these fundamental maxims.

* * * * *

In the end, the United States is left to argue that, despite the split in the circuits, despite the impending threat to the liberty of two individuals and the stigma of a criminal conviction to a corporation, and despite the serious, nationwide concern of both management and labor over the confused state of the law,[5] "there does not appear to be any pressing need for the Court to decide the issue

[5] *See, e.g.*, Br. *Amicus Curiae* of the Chamber of Commerce of the United States in Supp. of the Pet'r 2-3, 5-10.

now." United States Br. 26. Only an observer whose interest in labor relations is purely academic, or whose concern is limited to the civil consequences of a potential transgression, could come to such a conclusion. In a criminal prosecution involving real people and a real company, delay risks grave injustice. For the sake of the two individuals whose liberty is presently in jeopardy and the sake of those who must conduct business in the face of mixed signals as to their own potential criminal liability, the Court should resolve this issue now.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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